

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JAMES ALLEN REPINEC,
Plaintiff,
vs.
TODD FINCHER, et al.,
Defendants.

Case No. 2:14-cv-01067-MMD-GWF

ORDER

TODD FINCHER, et al.,) Application to Proceed *in Forma
Pauperis* (#1) and Complaint (#1-1)

This matter comes before the Court on Plaintiff's Application to Proceed *in Forma Pauperis* (#1), filed on June 30, 2014. Plaintiff attached his Complaint (#1-1) to his application pursuant to 28 U.S.C. § 1915(a).

BACKGROUND

Plaintiff brings this action pursuant to 42 U.S.C. § 1983, for violations of his Fourth Amendment right to be free from unreasonable search and seizure. Plaintiff alleges that on September 10, 2012, the Defendants, acting under color of law, wrongfully arrested him and transported him to the White Pine County Jail for suspicion of driving under the influence of a controlled substance. Plaintiff alleges that Defendant Fincher requested he consent to a blood withdrawal and upon refusal, Defendants tazed Plaintiff, physically restrained him, then proceeded to remove his blood by force. The results of the blood test were then used as evidence against Plaintiff, resulting in his imprisonment from the period of September 10, 2012 through July 10, 2014. Defendant Fincher allegedly cited Nevada's Implied Consent law as giving him the authority to draw Plaintiff's blood against his will. Plaintiff alleges, however, that on August 2, 2013, the Seventh Judicial District Court of Nevada ruled that the Nevada Implied Consent law, Nev. Rev.

1 Stat. § 484C.160, was unconstitutional. Plaintiff requests monetary damages for loss of wages in
 2 the amount of \$42,240 for the twenty-two months he was incarcerated and \$100 for each day of his
 3 confinement totaling \$66,900.00. Plaintiff also requests damages for mental distress and pain in
 4 suffering in the amount of \$50,000.

DISCUSSION

I. Application to Proceed In Forma Pauperis

7 Plaintiff filed this instant action and attached a financial affidavit to his application and
 8 complaint as required by 28 U.S.C. § 1915(a). Reviewing Plaintiff's financial affidavit pursuant to
 9 28 U.S.C. § 1915, the Court finds that he is unable to pre-pay the filing fee. As a result, Plaintiff's
 10 request to proceed in forma pauperis in federal court is granted.

II. Screening the Complaint

12 Upon granting a request to proceed *in forma pauperis*, a court must additionally screen a
 13 complaint pursuant to 28 U.S.C. § 1915(e). Specifically, federal courts are given the authority to
 14 dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which
 15 relief may be granted, or seeks monetary relief from a Defendant/Third Party Plaintiff who is
 16 immune from such relief. 28 U.S.C. § 1915(e)(2). A complaint, or portion thereof, should be
 17 dismissed for failure to state a claim upon which relief may be granted "if it appears beyond a
 18 doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to
 19 relief." *Buckey v. Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). Allegations of a *pro se*
 20 complaint are held to less stringent standards than formal pleadings drafted by lawyers. *See Haines*
 21 *v. Kerner*, 404 U.S. 519, 520 (1972). When a court dismisses a complaint under § 1915(e), the
 22 plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies,
 23 unless it is clear from the face of the complaint that the deficiencies could not be cured by
 24 amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

1. Plaintiff's claims under 42 U.S.C. § 1983

26 42 U.S.C. § 1983 provides a cause of action against persons acting under color of state law
 27 who have violated rights guaranteed by the Constitution. *See Buckley v. City of Redding*, 66 F.3d
 28 188, 190 (9th Cir. 1995). Where a § 1983 action seeking damages alleges constitutional violations

1 that would necessarily imply the invalidity of the plaintiff's criminal conviction or sentence, the
 2 plaintiff must establish that the underlying sentence or conviction has been invalidated on appeal,
 3 by a habeas petition, or through some similar proceeding. *See Heck v. Humphrey*, 512 U.S. 477,
 4 483-87 (1994). The Supreme Court later clarified that *Heck*'s principle (also known as the
 5 "favorable termination" rule) applies regardless of the form of remedy sought, if the § 1983 action
 6 implicates the validity of an underlying conviction or a prison disciplinary sanction. *See Edwards*
 7 *v. Balisok*, 520 U.S. 641, 646-48 (1997); *see also Whitaker v. Garcetti*, 486 F.3d 572, 583-85 (9th
 8 Cir. 2007) (explaining that the "sole dispositive question is whether a plaintiff's claim, if
 9 successful, would imply the invalidity of [the plaintiff's] conviction."); *Edwards v. Balisok*, 520
 10 U.S. 641, 646-48 (1997) (concluding that § 1983 claim was not cognizable because allegation of
 11 procedural defect would result in an automatic reversal of the prison disciplinary sanction.); *Heck v.*
 12 *Humphrey*, 512 U.S. 477, 483-87 (1994) (concluding that § 1983 claim was not cognizable because
 13 allegations were akin to malicious prosecution claim.)

14 If the district court determines that a plaintiff's action, even if successful, will not
 15 demonstrate the invalidity of any outstanding criminal judgment against plaintiff, then the action
 16 should be allowed to proceed, in absence of some other bar to suit. *See Heck v. Humphrey*, 512
 17 U.S. 477, 487 (1994). Thus, a suit for damages attributable to an allegedly unreasonable search
 18 may lie even if the challenged search produced evidence that was introduced in a state criminal trial
 19 resulting in the plaintiff's conviction so long as success in the suit will not necessarily imply that
 20 plaintiff's conviction was unlawful. *Id.* In *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973), the
 21 Supreme Court held that if a state prisoner seeking only damages "is attacking something other
 22 than the fact or length of ... confinement, and ... is seeking something other than immediate or more
 23 speedy release[.] ... a damages action by a state prisoner could be brought under [§ 1983] in federal
 24 court without any requirement of prior exhaustion of state remedies." *See Preiser v. Rodriguez*,
 25 411 U.S. 475, 494 (1973).

26 To bring a § 1983 excessive force claim under the Fourth Amendment, a plaintiff must first
 27 show that he was seized. *See Graham v. Connor*, 490 U.S. 386, 388 (1989). Next he must show
 28 that he suffered (1) an injury that (2) resulted directly and only from the use of force that was

1 excessive to the need and that (3) the force used was objectively unreasonable. *See Goodson v.*
2 *City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000). *See also Belch v. Las Vegas*
3 *Metropolitan Police Dept.*, WL 4610803, (D.Nev. 2012). Here, Plaintiff alleged that he was seized
4 and that the excessive force used was unreasonable. He failed to plead, however, that he was
5 injured by the excessive use of force other than to allege that he was unjustly incarcerated.
6 Therefore the Court is unsure whether Plaintiff intended to bring a § 1983 claim for excessive
7 force. Plaintiff's claim for damages for lost wages due to his incarceration cannot be pursued
8 unless and until his underlying conviction is invalidated. Plaintiff also seeks damages for mental
9 distress and pain and suffering. Plaintiff may pursue this damage claim to the extent it is based on
10 the alleged use of excessive force. He cannot recover general damages for mental distress or pain
11 and suffering resulting from his underlying conviction, however, unless that conviction is first
12 invalidated.

13 Because Plaintiff's complaint is ambiguous and appears to assert a claim that implies the
14 invalidity of Plaintiff's underlying conviction, the Court will dismiss it without prejudice. The
15 Court will grant Plaintiff leave to amend his complaint in accordance with the above discussion to
16 assert a claim for relief based on the alleged use of excessive force in violation of the Fourth
17 Amendment. In the event Plaintiff elects to proceed in this matter by filing an amended complaint,
18 he is informed that the Court cannot refer to a prior pleading to make his amended complaint
19 complete. Local Rule 15-1 requires that an amended complaint be complete in itself without
20 reference to any prior pleading. This is because, as a general rule, an amended complaint
21 supercedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once
22 Plaintiff files an amended complaint, as in an original complaint, each claim and the involvement
23 of each defendant must be sufficiently alleged. Accordingly,

24 **IT IS HEREBY ORDERED** that Plaintiff's Application to Proceed *in Forma Pauperis* is
25 granted. Plaintiff shall not be required to pay an initial partial filing fee. However, even if this
26 action is dismissed, the full filing fee must still be paid pursuant to 28 U.S.C. § 1915(b)(2).

27 **IT IS FURTHER ORDERED** that Plaintiff is permitted to maintain this action to
28 conclusion without the necessity of prepayment of any additional fees or costs or the giving of

1 security therefor. This Order granting *in forma pauperis* status shall not extend to the issuance of
2 subpoenas at government expense.

3 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915(b)(2), the Nevada
4 Department of Corrections shall pay to the Clerk of the United States District Court, District of
5 Nevada, 20% of the preceding month's deposits to Plaintiff's account (inmate #1003943), in the
6 months that the account exceeds \$10.00, until the full \$350 filing fee has been paid for this action.
7 The Clerk of the Court shall send a copy of this Order to the Finance Division of the Clerk's Office.
8 The Clerk shall also send a copy of this Order to the attention of the Chief of Inmate Services for
9 the Nevada Department of Corrections, P.O. Box 7011, Carson City, NV 89702.

10 **IT IS FURTHER ORDERED** that the Clerk of the Court shall file Plaintiff's Complaint
11 (#1-1).

12 **IT IS FURTHER ORDERED** that Plaintiff's Complaint be **dismissed**, without prejudice,
13 with leave to amend. Plaintiff shall have thirty days from the date of this order to file his amended
14 complaint in accordance with the discussion above. Plaintiff is advised that failing to do so may
15 result in the dismissal of this action for failing to comply with a Court order pursuant to Fed. R.
16 Civ. P. 41(b).

17 DATED this 8th day of July, 2014.

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GEORGE FOLEY, JR.
United States Magistrate Judge
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